No. 6490

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

SEATTLE TITLE TRUST COMPANY, AS GUARDIAN OF THE ESTATE OF VERNON A. PETERSON, INCOMPETENT, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF

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BRIEF

STATEMENT OF THE CASE

Plaintiff, appellee herein, instituted this suit to recover on a contract of War Risk Term Insurance granted its ward, Vernon A. Peterson, by the defendant while in its military service during the World War.

In its complaint (R. 1–4) plaintiff, after alleging the enlistment and discharge of insured, and the granting of the contract of insurance in the sum of $10,000, alleges in Paragraph IV (R. 3) that

while the contract was in force insured became permanently and totally disabled as a result of an enlargement of the lymphatic glands, disfunction of the cervical glands, a mental disorder, mental deterioration, nervous prostration, and neurasthenia. It prayed judgment for installments from January 1, 1919, the date of insured's discharge from the service.

To plaintiff's complaint defendant filed an answer (R. 5–7) admitting the enlistment and discharge of insured, and the granting of the contract, but denying that insured became permanently and totally disabled as alleged. Further answering (R. 6), the defendant averred that the contract sued on lapsed for nonpayment of the premium due February 1, 1919.

In its reply to defendant's answer the plaintiff denied that the contract lapsed on February 1, 1919, but affirms that the same matured on or prior to that date by reason of the happening of total and permanent disability (R. 8), as alleged in its complaint.

This cause was tried to a jury. (R. 13, 14.) At the close of all plaintiff's evidence the defendant moved the court for a nonsuit on the ground that the evidence adduced on behalf of the plaintiff did not establish a prima facie case, and was legally insufficient to sustain a verdict, which motion was denied. (R. 43.) At the close of all the evidence the defendant moved the court for a directed verdict on the same grounds and reasons assigned in

support of its motion for a nonsuit, which motion was denied by the court. (R. 76.) Whereupon the cause was submitted to the jury, which rendered its verdict for the plaintiff. (R. 9.) Whereupon judgment for plaintiff was rendered. (R. 9, 11.) Thereafter the defendant filed its motion for a new trial (R. 11, 12), which was denied (R. 12, 13). From the judgment in behalf of plaintiff defendant is here with this appeal. (R. 97.)

ASSIGNMENTS OF ERROR

I

The Court erred in denying the defendant's motion for a directed verdict, which motion was made at the close of the plaintiff's case, for the reason that the plaintiff did not prove permanent total disability of Vernon A. Peterson during the time his policy was in effect, and to which denial defendant took exception at the time of the interposition of said motion herein.

II

The District Court erred in denying defendant's petition for a new trial, which denial was excepted to by the defendant at the time of the interposition of said motion herein.

III

The District Court erred in entering judgment upon the verdict herein, as the evidence was insufficient to sustain the verdict or judgment.

IV

The District Court erred in denying defendant's motion for a directed verdict at the close of the entire testimony, which motion was interposed on the ground that Vernon A. Peterson had not been proven to have been permanently and totally disabled from following a gainful occupation in a substantially continuous manner during the time his policy was in effect.

V

That the Court erred in denying defendant's motion for a nonsuit at the close of the plaintiff's evidence, and renewed at the close of the entire case.

VI

That the Court erred in admitting in evidence plaintiff's Exhibits 2 to 15, inclusive, to the admission of which exhibits defendant duly objected, on the ground that their admission deprived the government of the right of cross-examination, which objection was overruled and exception noted.

PERTINENT STATUTES AND REGULATIONS

Section 5 of the World War Veterans' Act as amended July 3, 1930, Public 522:

> The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations,

not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact and law affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein. All officers and employees of the bureau shall perform such duties as may be assigned them by the director. All official acts performed by such officers or employees specially designated therefor by the director shall have the same force and effect as though performed by the director in person. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of compensation, insurance, vocational training, or maintenance and support allowance provided for in this Act, and forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided,* That regulations relating to the nature and extent of the proofs

and evidence shall provide that due regard shall be given to lay and other evidence not of a medical nature.

Section 13 of the War Risk Insurance Act (40 Stat. 555):

That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the Act, except as otherwise provided in section five. Wherever under any provision or provisions of the Act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment compensation, or insurance provided for in this Act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations, and the manner and form of adjudications and awards: *Provided, however,*

That payment to any attorney or agent for such assistance as may be required in the preparation and execution of the necessary papers shall not exceed $3 in any one case: *And provided further:* That no claim agent or attorney shall be recognized in the presentation or adjudication of claims under articles two, three and four, except that in the event of disagreement as to a claim under the contract of insurance between the bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to ered, to be paid by the claimant in behalf of payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid.

Any person who shall, directly or indirectly, solicit, contract for, charge, or receive, or who shall attempt to solicit, contract for, charge, or receive any fee or compensation, except as herein provided, shall be guilty of a misdemeanor, and for each and every offense shall be punishable

by a fine of not more than $500 or by imprisonment at hard labor for not more than two years, or by both such fine and imprisonment.

Section 400 of the War Risk Insurance Act (40 Stat. 409):

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States upon application to the bureau and without medical examination shall grant insurance against the death or total permanent disability of any such person in any multiple of $500 and not less than $1,000 or more than $10,000 upon the payment of the premiums as hereinafter provided.

Section 402 of the War Risk Insurance Act (40 Stat. 615):

> That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall not be assignable and shall not be subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them.

TERMS AND CONDITIONS OF SOLDIERS' AND SAILORS' INSURANCE

I, William C. DeLanoy, Director of the Bureau of War Risk Insurance in the Treasury Department, pursuant to the provisions of section 402 of an act "to amend 'An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department,' approved September 2, 1914, and for other purposes," approved October 6, 1917, hereby on this 15th day of October, 1917, by direction of the Secretary of the Treasury, determine upon and publish these full and exact terms and conditions of the contract of insurance to be made under and by virtue of the act:

"1. Insurance will be issued for any of the following aggregate amounts upon any one life: * * * Which installments will be payable during the total and permanent disability of the insured, or if death occur without such disability for 240 months, or if death occur following such disability, for a sufficient number of months to make 240 in all including months of disability already paid for in both cases except as otherwise provided.

"2. The insurance is issued at monthly rates for the age (nearest birthday) of the insured when the insurance goes into effect, increasing annually upon the anniversary of the policy to the rate for an age one year higher, as per the following table of rates:

* * * *

"Rates at ages higher or lower will be given on request.

The insurance may be continued at these increasing term rates during the war and for not longer than five years after the termination of the war, and may be continued thereafter without medical examination if the policy be converted into a form selected before the expiration of such five years by the insured from the forms of insurance which will be provided by the bureau, provided that premiums are paid therefor at the net rates computed by the bureau according to the American Experience Table of Mortality and interest at 3½ per cent per annum.

3. That the insurance has been granted will be evidenced by a policy or policies issued by the bureau, which shall be in the following general form (which form may be changed by the bureau from time to time, provided that full and exact terms and conditions thereof shall not be altered thereby):

(T. D. 20 W. R.)

TOTAL DISABILITY

Regulation No. 11 relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent.

TREASURY DEPARTMENT,
BUREAU OF WAR RISK INSURANCE,
Washington, D. C., March 9, 1918.

By virtue of the authority conferred in Section 13 of the War Risk Insurance Act

the following regulation is issued relative to the definition of the term "total disability" and the determination as to when total disability shall be deemed permanent:

Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.

"Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it.

Whenever it shall be established that any person to whom any installment of insurance has been paid as provided in Article IV on the ground that the insured has become totally and permanently disabled has recovered the ability to continuously follow any substantially gainful occupation, the payment of installments or insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

WILLIAM C. DELANOY,
Director.

Approved.
W. G. MCADOO,
Secretary of the Treasury.

ARGUMENT

POINT I

The court erred in denying defendant's motion for a nonsuit and its motion for a directed verdict.

Treasury Decision Number 20, page 10 of this brief, which is a regulation promulgated under sanction of law and of which courts will take judicial notice, defines a permanent and total disability within the meaning of the contract herein sued on to be "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation * * * whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it." The courts have in the main approved this definition. Hence for plaintiff to be entitled to recover it must produce some substantial proof that the insured, Vernon A. Peterson, within the time alleged in its complaint, namely, January 1, 1919, or prior to midnight of the 28th day of February, 1919, as charged by the court, had an impairment of mind or body which rendered it impossible for him to follow continuously any substantially gainful occupation and that such impairment of mind or body was founded upon conditions which rendered it reasonably certain that it would continue throughout his life.

Ruth Peterson for plaintiff testified (R. 15–23) that after his discharge insured went to California, where he worked a couple of weeks loading cars. That he then returned to Seattle, Washington, and went to work around July, 1919, working quite steadily on the street cars for two months on the extra list. That he was then transferred to the car

barn, and became head mechanic and continued to work there for six months, when he resigned. That after leaving the car barn he worked in a garage for two months and then did nothing for a few months and then commenced working for the Mission Theater. That insured was in the show business from May 1, 1921, until the middle of 1924. That after quitting this theater insured went to California, but did not work much there. That he returned to Tacoma, Washington, and worked in a theater there about three months, when he quit and returned to Seattle, Washington, where he tried to work, but did not do much and was placed in an asylum for the insane in the fall of 1925. This witness further testified (R. 18) that while insured worked at the car barn he went to work at eight o'clock and worked eight hours. That his work was quite steady. That he ate his meals regularly and spent his evenings at home.

This witness further testified in detail with reference to the nervousness of the insured, his peculiar habits in many instances, and odd things that he did. However, her testimony stands that he worked for the periods heretofore mentioned.

Other witnesses testified as to the peculiarities and idiosyncrasies of the insured. However, it appears from their testimony that the insured was engaged in different lines of work with reasonable continuity.

Dr. E. A. Nicholson for plaintiff testified (R. 34–38) that he examined insured on August 20, 1925,

April 8, 1926, and December 12, 1929, and that in the opinion of witness insured was not fit to take up any work at the time witness first examined him. This witness testified that insured's disability was paresis caused by syphilis, and went into great detail in explaining this disease.

On cross-examination this witness testified (R. 38) that he never saw insured until August, 1925. That a person may have syphilis for twenty years and never show any brain involvement and that up to the time a brain involvement develops syphilis constitutes little or no disability.

Harry B. Flanders for defendant testified (R. 49) that he was employed in the City Comptroller's office in the city of Seattle, and had warrants in connection with the employment of insured in 1919 and 1920. That the employment was apparently continuous. That there were twenty-three warrants dated from July, 1919, to June, 1920. That the checks are as follows:

> July 25, 1919, drawn for $54.98; August 11, 1919, for $62.42; August 26, 1919, for $64.94; September 10, 1919, $27.49; September 25, 1919, for $22.71; the next is for October 10, 1919, for $26.03; the next for October 25, 1919, for $63.98; November 10, 1919, for $58.40. The next for November 25, 1919, for $57.09; December 10, 1919, $57.75; December 24, 1919, $66.94; January 10, 1920, $65.30; January 27, 1920, $67.59; the next is for February 10, 1920, in the amount of $68.91; February 25, 1920, $56.44; March 10, 1920, for

$59.72; March 25, 1920, for $68.25; the next is April 10, 1920, for $72.18; April 27, 1920, for $68.25; May 10, 1920, for $68.25; May 25, 1920, $73.50; June 10, 1920, for $64.31; and June 25, 1920, for $15.09.

A. H. Grout for defendant testified (R. 51) that he had charge of the records of the Civil Service Department of the city of Seattle, and that same show that insured was first employed in July, 1919, and resigned June 4, 1920.

Albert Pohl for defendant testified (R. 54) that he was employed during the years 1919 and 1920 by the Municipal Railway; that he knew insured and worked directly with him. That insured was first hired as a machinist's helper and did that work. Shortly after that insured was put to work overhauling automobiles and repaired automobiles until the first part of June.

E. L. Newman for defendant testified (R. 60) that he was employed by the A. V. Love Dry Goods Company in 1928. That he knew insured, and that insured worked as a fireman for the same company and performed his duties all right in September and October, 1928.

Harriet Anderson for the defendant testified (R. 61) that she was bookkeeper for the Seattle Office Equipment Company. That she had the records of employment of insured by said company and that he was employed from April 5, 1929, to January 5, 1930, at the rate of $22.50 per week.

K. R. Terry for defendant testified (R. 61) that he was employed by the Seattle Office Equipment Company in 1929 and 1930 and that insured was an employee of the same company at that time. That witness observed insured there at that time. That insured was doing janitor work in the store and that his work was fairly satisfactory.

Margaret Mahan, a witness for defendant, testified (R. 74) that she was formerly employed by the Mission Theater in 1920 or 1921, and was there about six months. That insured was there when she first went there and managed the theater. That insured was there in the evening to see that the place was running and that during the day he fixed the films and things like that.

While the witnesses for plaintiff testified as to the different peculiarities of the insured, his nervousness and inattention to business at some times, the fact remains that their testimony shows that he worked with great continuity from shortly subsequent to his discharge until some time in 1925.

The testimony on behalf of defendant, which is uncontradicted, shows that the insured worked for the street car company from June, 1919, until June, 1920, with reasonable continuity and at substantial wages. Defendant's testimony further shows other employment at substantial wages.

In the case of *Owen D. Nicolay* v. *United States,* decided by the Tenth Circuit Court of Appeals on June 30, 1931, the court quoted with approval from

Woolworth Company v. *Davis* (C. C. A. 10), 41 Fed. (2d) 343, 347, as follows:

> When the testimony of a witness is positively contradicted by the physical facts, neither the court nor the jury can be permitted to credit it. *American Car & Foundry Co.* v. *Kindermann* (C. C. A. 8), 216 Fed. 499, 502; *Missouri, K. & T. Ry. Co.* v. *Collier* (C. C. A. 8), 157 F. 347, cert. denied, 209 U. S. 545, 28 S. Ct. 571, 52 L. Ed. 920. Cases from many jurisdictions are gathered in a note in 8 A. L. R. 798, supporting the proposition that uncontradicted evidence which is contrary to physical facts should be disregarded. Judgments can not and should not stand if they are entered upon testimony that can not be true.

The evidence in the case at bar discloses the physical fact that insured worked with reasonable continuity for substantially gainful wages for a period of six years. Therefore, under the ruling in the Nicolay case, supra, the testimony of the witnesses, indicating that insured was not able to do this work, should not be held to be "substantial evidence" sufficient to support the finding for plaintiff.

It appears from the testimony of Dr. E. A. Nicholson, a witness for plaintiff (R. 34) that insured's disability was caused by syphilis. Hence it seems that we have in this case a suit on a war-risk insurance contract where it will hardly be contended that the disability claimed was due to the insured's war service. Therefore there is no call for the applica-

tion of the rule intimated in some decisions in suits of this character that such contracts should be liberally construed in favor of the insured.

POINT II

The court erred in denying defendant's motion for a new trial and in entering judgment on the verdict.

For reasons assigned in the argument in support of Point I hereof, it was error in the trial court to deny defendant's motion for a new trial and entering judgment on the verdict in plaintiff's behalf.

POINT III

The court erred in admitting in evidence plaintiff's exhibits two to fifteen (2–15).

There was no testimony that the doctors who made these examinations were authorized to make same; that they were employees of the defendant at the time the examinations were made or otherwise; that the doctors were not available as witnesses or that the doctors whose names appeared as having made the examinations actually made them. Furthermore, these reports are hearsay in that they report simply what the doctor making them says he found upon examination of insured and represent the conclusion and opinion of the doctor based on facts he says he found. Also these reports contain statements made by the insured, which are clearly self-serving. In this connection it should be kept in mind that at the time the exami-

nations were purported to have been made the insured had applied to the defendant for compensation under the provisions of the then War Risk Insurance Act, and that the examinations, if made for the defendant were for the purpose of determining whether insured had any disability. Therefore, it was to the interest of the insured that he have a disability and certainly any statements he made at such a time fall within the class of self-serving statements the same as any statements a person makes to a doctor who examines him for the purpose of testifying in his behalf, such statements being, the writers of this brief understand, always excluded from evidence. Again by admitting these exhibits the defendant was denied its right of cross-examining the witnesses against it.

It is submitted that these reports were not admissible under the rule laid down in the cases of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, and *United States* v. *Cole,* 45 Fed. (2d) 339, and certainly their admission is in conflict with the rule laid down in the case of *United States* v. *James W. Wilson,* decided June 17, 1931, by the Fourth Circuit Court of Appeals.

In the Cole case, l. c. 341, the court said:

> There was no error in the admission of appellee's Exhibits H and I. These exhibits consisted of two reports of physical examinations of appellee each dated April 30, 1923, and signed by physicians of the Bureau. Only those parts of the reports

> which gave specific findings of fact were permitted in evidence. The examinations were made under the authority of the Director (Tit. 38, ch. 10, Sec. 426, U. S. C.) and were taken from the Bureau's files pertaining to appellee. It is insisted that these reports are (1) confidential and (2) hearsay. We can not agree. They are not confidential or privileged when required to be produced in any suit or proceeding pending in the United States Court (Tit. 38, ch. 10, Sec. 456, Clause (b), U. S. C., *Gonzalez* v. *U. S.,* 298 Fed. 1003) and in fact no privilege was claimed for them in the lower court. Further, we regard these reports as exceptions to the hearsay rule. They were made by the examining physicians under the sanction of official duty and as and for a permanent record of specific facts to be kept in the files of the Bureau. * * *

It will be noted that in the *Cole case* only that part of the reports which gave specific findings of fact were permitted in evidence, while in the instant case the entire reports, including the statements of deceased, were admitted.

In the *Runkle case,* l. c. 805, the court said:

> The plaintiff offered in evidence a statement purporting to be signed by one Doctor Maguire, and purporting to be an examination of the insured made on December 4, 1919. The report discloses an active pulmonary tuberculosis; an inability to perform any part of any occupation; concludes that

his chances for recovery or arrest are remote. The report recommends a rating for compensation of "Temporary Total." The report was found in the files of the attorney for the United States Veterans' Bureau for the State of Colorado. To this proffer of proof the defendant objected on the ground that the evidence was incompetent and immaterial, that the document had not been identified; and that it was hearsay.

The identification was not sufficient and the report was properly excluded. Since the case is to go back for another trial, we pass upon the other objections. If the report is properly identified as having been made by a doctor employed by the United States Government, and that it is his report of a physical examination made of the insured, it is not incompetent. * * *

This statute contemplates that those claiming the benefits of the War Risk Insurance Act may have access to such reports. Such access would be of little avail to the claimants if the reports could not be used in court. Moreover, the statute contemplates use in court by subjecting them to the process of the United States court. Furthermore, the generous attitude of the government toward the beneficiaries of the Veterans' Act repels any idea of a desire to conceal any material fact from the veterans or their beneficiaries. Particularly is this true of findings of a physical examination. The standing of the doctors employed by the Government is assurance of the integrity of their

> reports. In *Gonzalez* v. *United States,* 298 F. 1003, the district court required the government to produce for the examination of the plaintiff in a war risk insurance case, such reports and records. In *Evanston* v. *Gunn,* 99 U. S. 660, the Supreme Court held that the records of meteorological stations were admissible in evidence, such reports being of a public character, and made in pursuance of public duty. To the same effect see *M'Inerney* v. *United States* (1 C. C. A.) 143 F. 729. It is our conclusion that as far as material to the issues the report of Doctor Maguire, if properly identified, is admissible.

It will be noted that the court in the *Runkle case* required that reports of the character of plaintiff's Exhibits should be properly identified. Furthermore, in view of the use of the language, "Particularly is this true of findings of a physical examination," and the language, "It is our conclusion that as far as material to the issues, the report of Doctor Maguire, if properly identified, is admissible," found in the opinion, *supra,* it is to be inferred that the court had in mind that only the physical findings of the doctor were admissible.

In the *Wilson case* (not reported) the court said:

> Two main questions are raised by the appellant in its assignments of error: First, that the court erred in admitting certain replaintiff, which were contained in the files ports of physical examinations made of the

of the United States Veterans' Bureau; second, that the court erred in not directing a verdict for the defendant.

The reports in question, to the admission of which objection was made, were reports of physicians to the Veterans' Bureau, and contained, among other things, certain statements of plaintiff himself, made during the examination. In *United States of America* v. *Wescoat,* decided by this court, April 13, 1931, Judge Parker exhaustively discusses the question of the admission of evidence of this character, and this court held that the evidence in that case was admissible, because it constituted the "best evidence possibly obtainable," but, in the *Wescoat case,* there was no question of the admission of anything other than the certificate of the physicians, and the field-hospital tags were entries made by the field-hospital physicians in the ordinary course of professional duty. The physicians themselves were not available as witnesses, and the tags constituted the best evidence as to the findings of the physicians. In this case there is no showing that the physicians making the reports could not have been obtained as witnesses, and the judge admitted the entire report, including what may well be termed self-serving declarations, made by plaintiff at the time of the various examinations.

The cases of *Runkle et al.* v. *United States,* 42 Fed. (2d) 804, and *United States* v. *Cole,* 45 Fed. (2d) 339, relied upon by attorneys for the plaintiff, are easily distin-

guished from the instant case, and assuming without deciding that the reports in those cases were properly admitted these decisions are not controlling here. The admission of the records as they were here admitted is, in our opinion, reversible error.

For the foregoing reasons it is respectfully submitted that the judgment be reversed.

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U. S. GOVERNMENT PRINTING OFFICE: 1931